Approved For Release 2003/12/09 : CIA-RDP85-00375R000400050005-9
OGC Has Reviewed

6 October 1981

1961

STAT MEMORANDUM FOR: [redacted]

STAT FROM: [redacted]
Office of General Counsel

SUBJECT: Personal Liability of EAA Board of Directors

1. You have requested an opinion as to whether members of the Board of Directors of the Employees Activity Association (EAA) could be held personally liable for acts in connection with their service on that Board. This question is considered for the purpose of deciding whether insurance should be purchased, or other action taken, to protect against such liability. The memorandum concludes that insurance should be purchased.

2. The EAA is a non-profit, non-stock corporation incorporated under the laws of the Commonwealth of Virginia. It functions as an umbrella organization for recreational activities of CIA employees and operates a convenience store on the premises of CIA Headquarters. It is funded by dues of its members and income from the store, while enjoying free use of certain Agency facilities (mostly space and utilities). In legal parlance, the EAA is a "non-appropriated fund activity" -- it does not receive government funds but operates on government premises for the benefit of government employees. Some non-appropriated fund activities are legally deemed to be "instrumentalities of the United States Government" while others are not. As discussed below, the potential liability of members of the EAA Board would be substantially limited if the EAA were properly considered an instrumentality of the federal government. Therefore, that issue must be resolved first.

3. The case law is divided, depending upon the extent to which the particular non-appropriated fund activity is controlled by and integrated into its affiliated government agency. On the one hand, the Supreme Court has held that military post exchanges are "arms of the government . . . and partake of whatever immunities it may have under the constitution and federal statutes." Standard Oil Co. v. Johnson, 316 U.S. 481 (1942); see also Daniels v. Chanute Air Force Base Exchange, 127 F. Supp. 920 (E.D. Ill. 1955). The Court described the relevant characteristics of the post exchange as follows:

> The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers

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> can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.
> Standard Oil Co. v. Johnson, supra at 485.

Similarly, an Officers' Mess funded entirely by its own operations was held to be a "federal agency." United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960). On the other hand, the Hunt Club at Fort Benning, Georgia, has been held not to be a "federal agency." Scott v. United States, 377 F.2d 471 (5th Cir. 1964). In Scott, the court described the relevant characteristics of the Hunt Club as follows:

> The Hunt Club is located on the Fort Benning reservation, and its membership consists primarily of military personnel and their dependents. It is a self-supporting organization receiving no appropriations from the United States treasury. It maintains a small civilian staff paid entirely out of funds collected from the members. Permission to establish the club was granted by the Commanding General of Fort Benning, and he exercises ultimate authority over its activities. However, the normal activities of the club are overseen by a board of governors elected from its membership. The club's constitution provides that it is a "private association" which "shall not operate as an instrumentality of the Federal Government," and that it was established under Army Regulation 230-5, Para. 2b. This regulation permits military personnel acting in their unofficial capacities to form "private associations * * * which are not established to provide essential morale and recreational facilities," and exempts these associations from regulations applicable to "instrumentalities of the Government."
> Id. at 471-472.

4. There are strong parallels between the Fort Benning Hunt Club and the EAA. Both are chartered as private organizations; both are devoted to recreational activities; both are financially self-sustaining and employ a small staff paid out of non-appropriated income. Both use government facilities, serve government employees, and are established pursuant to government regulation. See HR [redacted] In short, the EAA is closer to the Hunt Club than it is to a military post exchange and therefore would probably be found not to be a federal agency or

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instrumentality.*

5. If the EAA were held to be an instrumentality of the federal government, the members of the EAA Board of Directors would have immunity from civil liability for all acts reasonably within the scope of their duties on behalf of the EAA. Members of the Board would remain liable for malicious acts or for acts which could not be defended as within the scope of their discretion. See 67 C.J.S. § 206. On the more likely assumption that EAA would be held not to be an instrumentality of the government, the liability of its directors is governed by the standards applicable to private corporations generally. The directors could be held personally liable for negligent acts resulting in personal injury or for tortious mismanagement of funds:

> The directors of a corporation are bound to use due care and to be diligent in respect of the management and administration of the affairs of the corporation and in the use or preservation of its property and assets; for a breach or neglect of duty in such regard, they are liable for losses or injuries proximately resulting. 19 Am Jur 2d §1276

Given the inherently hazardous nature of some of EAA's athletic and other activities, this liability could be substantial.** Furthermore, no matter how careful and diligent the EAA Directors may be, they cannot exclude the possibility of lawsuits, which are costly to defend even when they are without merit.

6. One means of protection is enactment of EAA bylaws providing that the EAA will pay any judgment, as well as attorney's fees and other costs of legal defense for directors sued in connection with their EAA service. Such protection is of course limited by the funds avialable to the EAA. The EAA Fund balance as of 30 June 1981 was approximately $128,000. Although this amount is arguably sufficient, there are strong policy reasons for not putting the Fund at risk. Additional protection should be provided by insurance coverage. Both options are expressly authorized by Virginia statute. Code of Virginia, Corporations §13.1-204.1.

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*This conclusion cannot be reached with certainty because of conflicting case law. In United States v. Hainline, 315 F.2d 153, 156 (10th Cir. 1963), the court held that the Aero Club at McConnell Air Force Base, similar in most respects to the Fort Benning Hunt Club, "was an instrumentality of the federal government."

**For example, an injured athlete could sue the Board for having failed to order the purchase of safety equipment.

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Conclusion

7. The EAA Board of Directors should consider enactment of EAA bylaws or insurance coverage, or both, to protect the members of the Board from personal liability arising out of their service for the EAA.

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The next item on the agenda was that of liability insurance for the
STAT Board of Directors. [redacted] reported on information he learned from other associations at a meeting of the League of Federal Recreation Associations. He learned that several members of associations have suits against their Board of Directors and that coverage had increased dramatically in the last five years (i.e. 0 to $1 Billion). After this information was presented,
STAT [redacted] advised that it would be practical for the Board to be insured.
STAT [redacted] to get more information and "leads" on this and call a special meeting of the Board or inform each Board member by telephone the results of his findings.

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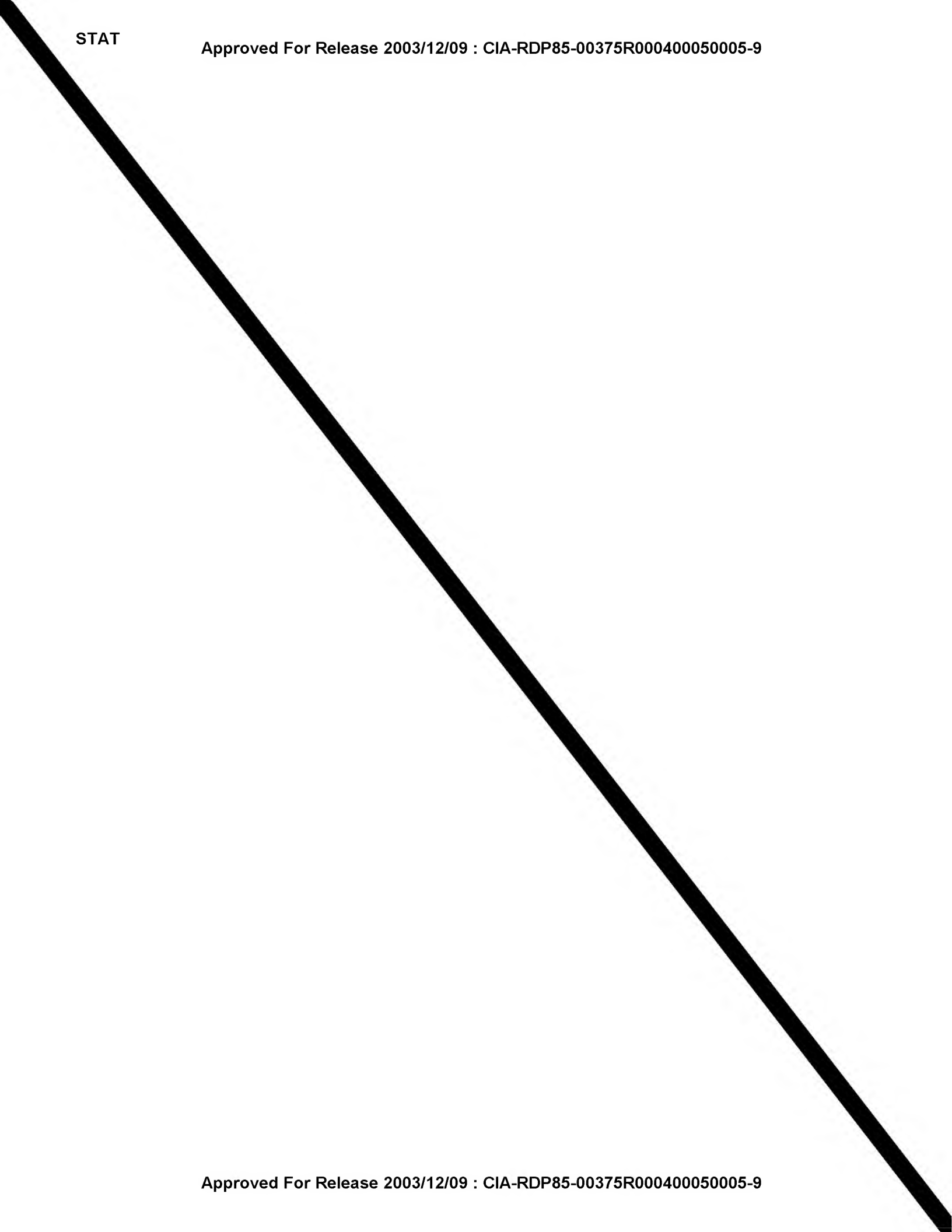

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